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In Supreme Court of the United States

October Term, 1931.
No. 546.

WALLACE S. HANDY,
Collector of Internal Revenue for the District of Delaware.
Petitioner,

vs.

DELAWARE TRUST COMPANY,
Executor Under the Last Will and Testament of William duPont, Deceased, et al.
Respondent.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE EXECUTOR AND HEIRS.

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OPINIONS BELOW.

The opinion of the District Court upon the demurrer to the plaintiff's declaration is reported in 51 Fed. (2d) 867 and the final opinion of the District Court is reported in 53 Fed. (2d) p. 1042.

JURISDICTION.

The case is here on certificate of the Circuit Court of Appeals for the Third Circuit under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION CERTIFIED.

The question certified is as follows:

1. Does the second sentence of Section 302 (c) of the Revenue Act of 1926 violate the due process clause of the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

The Fifth Amendment to the Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Revenue Act of 1926, 44 Stat., Ch. 27, Sec. 302 (c), p. 70:

TITLE III—ESTATE TAX.

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

STATEMENT OF FACTS.

The executor accepts the statement of facts set out in the brief for the Collector and respectfully calls the attention of the Court to the Findings of Fact made by the trial court and set out, in extenso, in 53 F. (2d) 1042, at page 1043, and to the conclusions of law at page 1050.

ARGUMENT.

I.

The Genesis of the Second Sentence of Section 302 (c) of the Revenue Act of 1926.

The second sentence of Section 302 (c) of the Revenue Act of 1926 appears for the first time in that Act. The Revenue Acts of 1916 to 1924, inclusive, uniformly contained a provision that transfers made within a certain time prior to death, without consideration, were presumed to have been made in contemplation of death. The presumption established by Revenue Acts prior to the Act of 1926, however, was only prima facie, and, so, rebuttable if the facts in a given case were such as to overthrow the presumption, the effect of the presumption being to shift the burden of proof, not to bar an estate from proving the facts with respect to a given transfer.

By Section 302 (c) of the Revenue Act of 1926 Congress departed from the prior practice applicable to transfers made by a decedent prior to death, and, by legislative fiat, adopted a conclusive presumption

that any gift or transfer made within two years of death, without consideration, regardless of its character and of the circumstances attending it, was made in contemplation of death. The right to be heard as to the circumstances of such a transfer was completely barred.

II.

The Nature of the Tax Imposed.

Title III of the Revenue Act of 1926 is captioned "Estate Tax." Section 302 of the Act defines the gross estate of a decedent for the purposes of the Act and prescribes the subject matter at which the tax is directed.

The first and caption sentence of paragraph (c) of Section 302 prescribes that a transfer made by a decedent in contemplation of death, and without consideration, shall be included in the gross estate of the decedent. The time of such a transfer is not circumscribed. Whether or not such a transfer was made within a given period prior to death is, therefore, immaterial under the first sentence of the Section. Under that sentence, whether or not a transfer made by a decedent, at any time, is to be included in his gross estate for the purposes of the Act is a question of fact to be determined from the evidence.

The second sentence of Section 302 (c), the part of the Statute particularly involved in this case, does not purport to provide a new class or kind of property to be brought within the gross estate of the decedent at the time of his death for the purpose of taxation. It does purport to expand the scope of

transfers defined in the first sentence of the section, viz, transfers made in contemplation of death, by bringing within that class transfers which, as in the case at bar, were not, in fact, made in contemplation of death. To produce this result the sentence ignores the facts surrounding a given transfer, and, without permitting the estate to be heard on the actual facts in the case, conclusively and arbitrarily presumes that every transfer made within two years of death, without consideration, was in fact made in contemplation of death and is, therefore, to be considered as a part of the gross estate of the decedent. The sentence therefore sets up an arbitrary conclusive rule of evidence which deprives an estate of its day in court with respect to the main fact in issue.

Death is a necessary condition precedent to the incidence of the tax imposed by Title III of the Act in question. Section 302 (c) of the Act has no connection whatever with the taxation during the lifetime of the donor of gifts made by him. So far as that section is concerned, no tax becomes due on a transfer made during the lifetime of the donor until the circumstance of death has overtaken him.

The nature of Federal Estate taxes is authoritatively defined by the Supreme Court in the case sustaining the power of Congress to levy an estate or succession tax, *Knowlton* v. *Moore*, 178 U. S. 41. The opinion of the Court in that case was delivered by Mr. Chief Justice White, who said at page 56:

> "Although different modes of assessing such [death] duties prevail, and although they have

different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

And at page 57:

"Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."

The Inheritance Tax Statute under consideration in the Knowlton case was sustained as an excise on the privilege of transmitting property at death.

In *Reinecke* vs. *Northern Trust Company*, 278 U. S. 339, in which case Sections 401 and 402 of the Revenue Act of 1921, corresponding to Sections 301 and 302 of the Revenue Act of 1926, were under consideration, Mr. Justice Stone speaking for the Court, at page 347 said:

"In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred."

III.

Summary of Argument.

There is no longer any question but that Congress has the power to impose a succession, transfer, in-

heritance or estate tax provided that—

1. It selects a proper subject or occasion at or upon which to direct the tax; and

2. That in imposing the tax a reasonable classification of property or transactions falling within the general object of the tax is made.

It is now established that in passing the Revenue Act of 1926 Congress could have levied a tax on gifts inter vivos, *Bromley* vs. *McCaughn*, 281 U. S. 124; and it was established by *Knowlton* vs. *Moore*, *supra*, that the transmission of property at death is a legitimate occasion for levying a tax or excise on the property transferred. It is not urged that the second sentence of Section 302 (c) of the Revenue Act of 1926 is invalid because Congress did not select a proper subject or occasion upon which to levy a tax. It is contended that the Statute is invalid because without giving the taxable an opportunity to be heard, it attempts to bring within the taxable object transfers made by the decedent during his lifetime but not in contemplation of death nor otherwise testamentary in character—transactions and property having no reasonable or substantial relationship to the object at which the tax is aimed, to-wit, the transfer or transmission of property at death.

In order for the tax imposed by the contested sentence (second sentence, Section 302 (c) Revenue Act of 1926) to be upheld, it must be sustained either as a tax on gifts inter vivos, or as a tax aimed at the transfer of property at death. If it cannot be so sup-

ported, then it is submitted that it should be held unconstitutional.

Point I.

The Sentence in Question Cannot Be Supported Under the Fifth Amendment to the Constitution if It Is Construed as a Tax Directed at Gifts Inter Vivos.

The authorities are so clear on the foregoing point that but little space is required to dispose of it. A Statute in all respects similar to the second sentence of Section 302 (c) of the Revenue Act of 1926 was before this Court in *Schlesinger* vs. *Wisconsin,* 270 U. S. 230. The Schlesinger case reached this Court on appeal from a decision of the Supreme Court of the State of Wisconsin, reported in *State* vs. *Schlesinger,* 184 Wis, 1. The Supreme Court of Wisconsin sustained the validity of the State Statute but its action was overruled by this Court. The Statute in question in the Schlesinger case provided that transfers made within six years of death should be conclusively presumed to have been made in contemplation of death. The Supreme Court of the State of Wisconsin admitted that the tax imposed by the Wisconsin Statute could not have been sustained as a tax on gifts inter vivos. The Court said, at page 10:

> "We agree with the appellants that the classification made will not support a tax as one on gifts *inter vivos* only. Under such taxation, the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within

six years of marriage or any other event. It is only because one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid. Gifts made in contemplation of death stand in a class by themselves, and as such they are made a part of the Inheritance Tax Law to the end that it may be effectively administered."

In discussing the constitutionality of the tax attempted to be imposed by the Wisconsin statute under consideration in the Schlesinger case as a tax on gifts inter vivos, this Court at pages 239 and 240 said:

> "The Court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary'. We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction."

The argument that the second sentence of Section 302 (c) of the Revenue Act of 1926 can be sustained as a tax on gifts inter vivos was considered in the case of *Guinzburg* v. *Anderson,* 51 Fed. (2d) 592. In disposing of the contention Cox J. at page 593 said:

"The government's argument that the tax can be sustained as an inter vivos gift tax, under the authority of *Bromley* v. *McCaughn*, 280 U. S. 124, 50 S. Ct. 46, 74 L. Ed, 226, is not only not borne out by the language of the section, but is thoroughly unsound. Under the statute: (a) The gift is included in the estate at the value at the date of death irrespective of the value at the time of receipt; (b) the amount of the tax is not based on the gift itself but on the value of the entire net estate; and (c) the tax falls upon the interest of the beneficiaries in the estate, and not upon the donee, unless the estate is inadequate. I do not think, therefore, there is any possible justification for upholding the tax as a gift tax. As stated by Chief Justice Hughes in *U. S.* v. *Wells, supra,* at page 118 of 283 U. S., 51 S. Ct. 446, 452, 'If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts inter vivos which spring from a different motive.' Furthermore, much the same contention as urged by the government in the present case was made in the *Schlesinger Case,* and rejected by the Wisconsin Supreme Court, 184 Wis. 1, 199 N. W. 951, even before the case reached the Supreme Court of the United States. *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 238, 239, 46 S. Ct. 260, 70 L. Ed. 557, 43 A. L. R. 1224."

The Guinzburg case was appealed by the Government and the decision of Judge Knox was sustained. (Decision not yet reported.)

Obviously, too, Title III of the Revenue Act of 1926 is not broad enough to include a tax on gifts inter vivos, not made in contemplation of death.

This Court in *Reinecke* v. *Northern Trust Company, supra,* referring to Sections 401 and 402 of the Revenue Act of 1921 said, at page 347:

> "It is not a gift tax and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126."

Viewed as a tax on gifts inter vivos, therefore, the second sentence of Section 302 (c) of the Revenue Act of 1926 is unconstitutional, because the classification attempted would be wholly arbitrary and capricious. If the tax be aimed at gifts inter vivos, there is no logical reason why such gifts made within two years of death may be burdened while gifts made beyond the two year period are exempt. If, therefore, the tax imposed by the second sentence of Section 302 (c) is to be sustained, it must be sustained as a tax directed at the transmission of property at death.

Point II.

The Second Sentence of Section 302 (c) Is Unconstitutional Under the Due Process Clause of the Fifth Amendment of the Constitution if It Be Construed As Aiming a Tax at Property Forming the Estate of a Deceased Person.

A.

The classification attempted is arbitrary, unreasonable and capricious, because—

1. Transfers inter vivos not made in contemplation of death and not intended to take effect in possession or enjoyment at death bear no reasonable re-

lationship to the tax on the transfer of property at death.

2. There is no reasonable basis of distinction justifying the selection of gifts made within two years of death and exempting those made more than two years prior to death.

B.

The method used by the statute is a denial of due process.

1. Congress has no power to establish rules which under guise of regulating the presentation of evidence conclusively presume the ultimate fact upon which a tax is based and, without giving an opportunity for a hearing, impute to the fact so presumed the legal significance of actual fact.

If the second sentence of Section 302 (c) of the Act in question is considered as a tax on property transmitted by decedent at death, then to sustain the Statute it is necessary to justify the classification of all transfers of property made by him during his life and within two years of death, regardless of the circumstances, with the transfer by him of property at death. The object of Title III of the Revenue Act of 1926 is obvious. The nature of estate and inheritance taxation has been clearly defined by this Court as above shown. It is a tax imposed upon the transfer of property, the generating source of which is death. The object of such legislation is to impose a tax on the transmission of property from the dead to the living. *Knowlton* v. *Moore,* supra.

It is well settled that the power to classify for purposes of taxation:

> "Must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Company* v. *Virginia*, 253 U. S. 412, 415; *Louisville Gas Company* v. *Coleman*, 277 U. S. 32, 37; *Air-Way Corporation* v. *Day*, 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240."
>
> *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, at page 160.

In *Southern Railway Company* v. *Green*, 216 U. S. 400, the Court at page 417 said:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."
>
> *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 155, 165.
>
> *Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S. 79.
>
> *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559.

We understand the rule to be that in order to be classified as a part of the estate of the decedent a

transfer of property by him, inter vivos, made within two years of death must meet two conditions:

First, the transfer must bear a reasonable relation to the transfer of property occasioned by death, that is, the transfer must be germane to the intended result of the legislation.

Second, the selection of such a transfer for inclusion within the taxable class must not be capricious and arbitrary.

The rule is well illustrated by the case sustaining an estate tax on gifts made in contemplation of death, *Milliken* v. *United States,* 283 U. S. 15, in which case Mr. Justice Stone, speaking for the Court, at page 20, said:

> "This Court has not passed directly on the constitutionality of the federal taxation of gifts made in contemplation of death. But taxation of transfers at death has been upheld, *Knowlton* v. *Moore,* 178 U. S. 41, as has, more recently, the taxation of gifts inter vivos, *Bromley* v. *McCaughn,* 280 U. S. 124; and we hold, as this Court has several times intimated, that the inclusion of this type of gifts in a single class with decedents' estates to secure equality of taxation, and prevent evasion of estate taxes, is a permissible classification of an appropriate subject of taxation. See *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Tyler* v. *United States,* 281 U. S. 497, 505; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Taft* v. *Bowers,* 278 U. S. 470, 482; *cf. Schlesinger* v. *Wisconsin,* 270 U. S. 230, 239."

And at page 23:

> "It is sufficient for present purposes, that such gifts are motivated by the same considerations

as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. It is thus an enactment in aid of, and an integral part of, the legislative scheme of taxation of transfers at death."

1. Transfers Inter Vivos Not Made in Contemplation of Death and Not Intended to Take Effect in Possession or Enjoyment at Death Bear No Reasonable Relationship to the Tax on the Transfer of Property at Death.

Transfers actually made in contemplation of death have been held taxable as a part of the estate of the decedent upon the theory that such transfers are testamentary in character and bear a reasonable relation to testamentary dispositions. *Milliken* v. *U. S., supra.* So the classifications in *Reinecke* v. *Northern Trust Company,* 278 U. S. 339, involving a transfer over which the decedent had reserved a power of revocation, and *Tyler* v. *United States,* 281 U. S. 497, involving property held by the entirety, were sustained on the ground that in each case there was a shifting of economic benefit at death, so that the Court found that in each case there was in substance a testamentary disposition. It may fairly be assumed from the first sentence of Section 302

(c) of the Revenue Act of 1926, which specifically defines the class of gifts inter vivos to be brought within the taxable class—property transferred at death—that by writing the second sentence into the Act Congress understood that in order for gifts inter vivos to be taxable as a part of a decedent's estate they must first be given the legal import of gifts made in contemplation of death. Whereas, however, gifts made in contemplation of death, being testamentary in character, have a reasonable relation to the object of estate taxation, which is in the nature of an excise directed at the transfer of property at death, gifts inter vivos, which in fact were not made in contemplation of death, obviously can have no reasonable relation to transfers passing upon the occasion of death and are not germane to the basis of the classification. Gifts inter vivos not made in contemplation of death lack the distinguishing features of gifts made in contemplation of death. *United States* v. *Wells, supra.* The two classes of gifts spring from different motives. The tax imposed on gifts made in contemplation of death is an entirely different kind of tax from a gift tax and has its origin in a different source from that permitting a tax on gifts inter vivos not made in contemplation of death. In the absence of such reasonable relationship, the inclusion of transfers inter vivos, not in fact made in contemplation of death, with the transmission of property at death is capricious and unreasonable.

2. There Is No Reasonable Basis of Distinction Justifying the Selection of Gifts Made Wtihin Two Years of Death and Exempting Those Made More Than Two Years Prior to Death.

The effect of the Statute demonstrates its arbitrary character. The practical results effected by a statute is one of the best tests of the reasonableness of an attempted classification. The operation of the Statute under consideration makes it clear that its practical results will be unfair and unequal in their effect. A donor may at any time during his life make a transfer which is in fact testamentary in character. It is no less true that at any time during his life a decedent may make a gift which is not in contemplation of death and bears no relationship whatever to a testamentary disposition. To select such a transfer for classification with the transfer of property at death is obviously illogical and unreasonable. To select such a transfer made within two years of death and eliminate those made beyond the two year period is even more unreasonable. There is obviously no reasonable basis of distinction between a transfer made 731 days before death and a similar transfer made 730 days before death. *Louisville Gas & Electric Company v. Coleman*, 277 U. S. 32. Such a selection is plainly discriminatory and a clear denial of equal protection.

The basis of the tax imposed by Title III of the Revenue Act of 1926 is the circumstance of the transmission of property at death. The time of

death is not material. The tax is not laid directly on a transfer inter vivos. It is laid on the gross estate of the decedent. The property transferred is not subject to the tax at the time of the transfer. The property becomes taxable only if the accident of death occurs within two years of the transfer. That accident may or may not happen. The language of this Court in *Reinecke* v. *Northern Trust Company, supra,* is apropos. Said the Court at page 347:

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. *Cf. Y. M. C. A. v. Davis,* 264 U. S. 47, 50; *Edwards* v. *Slocum,* 264 U. S. 61, 62; *N. Y. Trust Co.* v. *Eisner,* 256 U. S. 345, 349. It is not a gift tax, and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift inter vivos, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

The above language is equally applicable to the 1926 Act. *American Security and Trust Company et al.* v. *Commissioner,* 24 B. T. A. page 334. The effect of the conclusive presumption of the contested

provision is to cause a transfer, which the donor has the right to make and which is not taxable when made to become taxable in the event that the donor dies within two years from the date of the transfer. It is fundamental that tax laws operate specifically and definitely. The tax attempted by the contested provision is highly speculative depending on that most unknown of all things, to-wit, the time of death.

The capricious character of the classification attempted is further illustrated as follows:

Let us assume that in 1928 A's property consisted solely of corporate stocks. Without any thought of death and not in contemplation thereof he transfers one-half of his holdings under an irrevocable trust. He dies at the peak of the stock market boom in 1929. His Executors have a year within which to settle his estate. The second sentence of Section 302 (c) adds the gift made by him in 1928 to his gross estate on the basis of the value existing at the time of death. It may very well follow that before his estate could be settled the securities actually remaining in his estate at the time of his death would have so far depreciated that they would not amount to enough to pay the tax on both the trust created by him and the part of the estate held by him at the time of his death. Certainly it would be improper to base a tax on the Estate of "A" on the basis of property owned by "B" at the time of "A's" death. This Court in *Hoeper* v. *Tax Commission of Wisconsin*, No. 17, October Term, 1931, has held that income of

a wife cannot be used as the basis for the determination of income tax on the husband. The contested provision attempts to impose a tax on the estate of "A" on the basis of property legally transferred by him by a transaction not testamentary in character, the gift being beyond his recall. It would be not more unreasonable to tax a decedent in 1931 for the property which he actually had before his stock market losses in 1929. A situation very similar to the assumed case taken for illustration is *Nichols* v. *Coolidge, supra.* In that case the Court at page 542 said:

> "The statute requires the executors to pay an excise ostensibly laid upon transfers of property by death from Mrs. Coolidge to them but reckoned upon its value plus the value of other property conveyed before the enactment in entire good faith and without contemplation of death. Is the statute, thus construed, within the power of Congress?
>
> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the Challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and

the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Frew* v. *Bowers,* 12 Fed. (2d) 625."

As in the Coolidge case, so in the instant case, an excise is prescribed but the amount of it is made to depend upon past lawful transactions not testamentary in character, the time of the incidence of the excise being undeterminable at the time of the transfer.

Again: "A" and "B" are brothers and have like estates. On Monday "A" makes a gift of $100,000 to his son and on Tuesday "B" makes a gift of $100,000 to his son. Neither gift is made in contemplation of death. The two brothers are killed simultaneously in an automobile accident two years from the time of the gift of "B" to his son. Under the contested sentence "B's" estate is taxed on the gift made to his son on Tuesday and "A's" estate escapes taxation on the gift to his son made on the preceding day. It is perfectly clear that there is no reason for imposing a tax on "B's" estate and not imposing one on "A's" estate for the gifts made by them. There is no possible distinction between the two cases except the accident of 24 hours in the incidence of the two gifts. This distinction palpably bears no reasonable relation to the object of the tax.

It is contended that if gifts in fact not made in contemplation of death cannot reasonably be classified with transfers testamentary in character, then Congress for purposes of classification cannot con-

clusively presume them to be in contemplation of death, and, without giving the taxable an opportunity to be heard as to the actual facts, attribute to arbitrarily presumed facts the legal significance of actual facts.

It is argued by the Government that this Court in no case has declared a classification invalid under the due process clause of the Fifth Amendment. This argument at best contains a negative pregnant. Counsel cites no case in which a classification such as the one under discussion has been attempted.

Further, it is not entirely true that this Court has never declared a federal classification void as being in violation of due process. In *Nichols* v. *Coolidge*, 274 U. S. 531, there was before this Court Section 402 of the Revenue Act of 1918. The Section provided that there should be included in the gross estate of a decedent the value of property transferred at any time but intended to take effect in possession or enjoyment at or after death. Under this statute the Commissioner attempted to include in the gross estate of the decedent irrevocable transfers made by her prior to the enactment of the statute. It may be that the decision of the Court was based largely upon the fact that the statute was retroactive, but at any rate this Court refused to permit the classification attempted because it was in denial of due process.

B.

The Method Used by the Statute Is a Denial of Due Process.

One of the most fundamental rights guaranteed

by the Constitution is that every person shall have the right to be heard on all matters affecting his life, liberty or property.

Dartmouth Coll. v. *Woodward,* 4 Wheat. 519.
Cooley's Constitutional Limitations, Vol. II, 8th Ed. Ch. XI.

The rule applies to tax measures.

"Former adjudications in this Court have settled the law to be that the assessment of a tax is action judicial in its nature requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require."

Central of Georgia Railroad v. *Wright,* 207 U. S. 127, at page 138.
Londoner v. *Denver,* 210 U. S. 273.
Turner v. *Wade,* 254 U. S. 64.
Cooley on Constitutional Limitations, 8th. Ed. n. 2, page 1040.

1. Congress Has No Power to Establish Rules Which Under Guise of Regulating the Presentation of Evidence, Conclusively Presume the Ultimate Fact Upon Which a Tax Is Based, and, Without Giving an Opportunity for a Hearing, Impute to the Fact So Presumed the Legal Significance of Actual Fact.

Hoeper v. *Tax Commission of Wisconsin, et al,* No. 17, October Term, 1931.
Mobile, Jackson & Kansas City Railroad v. *Turnipseed,* 219 U. S. 35;
Manley v. *Georgia,* 279 U. S. 1;
McFarland v. *American Sugar Refining Co.,* 241 U. S. 79;

Bailey v. *Alabama*, 219 U. S. 219;
Cockrill v. *California*, 268 U. S. 258;
Shwab v. *Doyle*, 269 Fed. 321 (C. C. A. 6th)
Cooley's Constitutional Limitations, 8th Ed. 768;
Howard v. *Moot*, 64 N. Y. 268;
In re Barbours Estate, 185 N. Y. (A. D.)445. Affirmed by Court of Appeals 226 New York 639, without opinion.

In *Hoeper* v. *Tax Commission of Wisconsin, supra*, a Statute of the State of Wisconsin attempted to add to the income of a husband the income of his wife and lay an income tax on the aggregate of the two incomes. In holding the Act unconstitutional this Court said:

> "That which is not in fact the taxpayer's income cannot be made such by calling it income (Compare *Nichols* v. *Coolidge*, 274 U. S. 531, 540)."

In *Mobile, Jackson & Kansas City R. R.* v. *Turnipseed, supra* there was before this Court a statute of the Legislature of the State of Mississippi abrogating the common law fellow servant's rule as to employees of railroad corporations, and providing that, in actions against railroads for damages, proof of injury resulting from the operation of trains should be prima facie evidence of want of reasonable skill and care on the part of the servants of the Railroad Company. The Railroad Company contended that the statute amounted to an arbitrary and capricious classification and was a denial of due process and equal protection. This Court in considering the nature of statutory presumptions said, at page 42:

> "The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. For a discussion of some common law aspects of the subject see *Cincinnati etc. Ry.* v. *South Fork Coal Co.*, 139 Fed. Rep. 528 et seq."

The Turnipseed case was cited with approval in *Schlesinger* v. *Wisconsin, supra.*

In *Shwab* v. *Doyle,* 269 Fed. (C. C. A. 6th), there was under consideration the rebuttable presumption, contained in Section 202 of the Revenue Act of 1916, that transfers made within two years of death should be considered as having been made in contemplation of death. Said the Court at page 333:

> "The instruction that the 'presumption' afforded by the prima facie clause of section 202b, which is referred to in subdivision (a) of the first division of this opinion, could be taken into account in determining the fact of 'contemplation of death,' was not erroneous. *R. R. Co.* v. *Landrigan,* 191 U. S. 461, 473, 474, 24 Sup. Ct. 137, 48 L. Ed. 262. The provision in question raises a presumption of fact, not a presumption of law, and under well-settled rules a presumption of fact may be taken into account in determining the ultimate fact. The presumption is merely a rule of evidence whose enactment is within the legislative competency. *Mobile, etc. R. R. Co.* v. *Turnipseed,* 219 U. S. 35, 42, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463. The very object

> of a presumption of fact is to supply the place of facts. *Lincoln* v. *French,* 105 U. S. 614, 617, 26 L. Ed. 1189. Of course, a presumption can never be allowed against ascertained and established facts. But unless the statutory presumption may properly be taken into account in determining the ultimate fact, it has no office. Elements which, in the absence of evidence to the contrary, are made sufficient to conclusively establish the ultimate fact, cannot be said to have no evidentiary influence in reaching that conclusion."

Manley v. *Georgia,* 279 U. S. 1. In the Manley case the Georgia Banking Act provided that every insolvency of a bank should be deemed fraudulent, and the president and directors of the institution punished by imprisonment and labor in the penitentiary unless the presumption of fraud could be met by showing tha the Bank had been managed with the same care and diligence that agents receiving commissions for their services were required to observe. Said this Court, at page 5:

> "State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue, is valid if there is a rational connection between what is proved and what is to be inferred. If the presumption is not unreasonable and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. *Mobile, J. & K. C. R. R.* v. *Turnipseed,* 219 U. S. 35, 43. A prima facie presumption casts upon the person against whom it is applied the duty of

> going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendent. *Bailey* v. *Alabama,* 219 U. S. 219, 233, et seq. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."

In Barbour's estate, supra, there was involved the question whether the transfer of the estate of a decedent was taxable under the provisions of the New York Transfer Act. The Act contained a provision that for the purposes of the statute:

> "Every person shall be deemed to have died a resident and not a non-resident of the State of New York if and when such person shall have dwelt or shall have lodged in this state during and for the greater part of any period of twelve consecutive months in the twenty-four months next preceding his or her death."

It was developed that the decedent had lodged in the State of New York for the period required by the Statute in the twenty-four months next preceding his death. Nevertheless, it was established by the evidence that he was not in fact a resident of the State of New York. The tax authorities of the State attempted to give the statute the force of a conclusive presumption. In discussing the statute the court said, at page 457:

> "With reference to the power of the Legislature to enact a statute of the force which the Comptroller seeks to give to the amendment of 1916 to the Transfer Tax Law, while it is not

> open to serious dispute that it has power to enact that one fact shall be evidence of another, it is a self-evident proposition that the Legislature cannot make so that which is not so. When, as here, the statute says that under the circumstances named residence shall be deemed to exist, and the fact is that is does not exist, the statute does not make the fact otherwise than it is. At most, it creates a presumption which may be overcome by evidence to the contrary."

No case has been found, and it is confidently believed that no case can be found, where this Court has approved an attempt by Congress or by a State Legislature to enact a conclusive presumption of the ultimate fact forming the basis of a tax which presumed fact is contrary to the actual fact.

The second sentence of Section 302 (c) of the 1926 Act plainly operates to bar the taxable from the right to be heard on the ultimate fact, that is, whether a gift inter vivos was made in contemplation of death. In other words, the challenged provision sets up a conclusive presumption of the main fact in issue, to-wit, whether a gift in a given case, made within two years of death, is in fact made in contemplation of death, and then proceeds to give to the ultimate fact so presumed the legal significance of a transfer actually made in contemplation of death. The facts of the given case are ignored. Indeed, the facts are more than ignored because in a case where the transfer is made not in contemplation of death, a presumption is introduced which has the effect of supplying facts which do not actually exist.

The Issue in This Case Is Governed by Schlesinger vs. Wisconsin, 270 U. S. 230.

Reference has already been made in this brief to the case of *Schlesinger* v. *Wisconsin, supra.* It is the contention of the Executor that the issue in this case is authoritatively determined by the findings of this Court in the Schlesinger case. The Schlesinger case involved a statute of the State of Wisconsin strictly analogous and similar in all material respects to Section 302 (c) of the Revenue Act of 1926. So similar are the provisions of the Wisconsin statute, which was under consideration in the Schlesinger case, to the provisions of Section 302 (c) of the Revenue Act of 1926, here under consideration, that, for the convenience of the Court, the two provisions are herein set out in parallel:

WISCONSIN STATUTE	FEDERAL STATUTE
"Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section."	"Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one

> person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title."

Attention is invited to the comprehensive comparison of the Wisconsin statute and Section 302 (c) of the Revenue Act of 1926 made by the Board of Tax Appeals in *American Security & Trust Company, et al.* v. *Commissioner,* 24 B. T. A. 334. So exhaustive is the comparison made by the Board of Tax Appeals that it would be surplusage to add anything to the analysis made by the Board. An examination of the two statutes illustrates that the Wisconsin Statute imposes an inheritance tax on the transfer to any person of property by will or intestacy, while the Revenue Act of 1926 imposes an estate tax upon the transfer of the net estate of any person dying after the passage of the Act. Counsel for the Collector suggest that the statutes may be distinguishable on this ground, but this cannot be. The tax in each case is an excise levied upon the transfer of property occasioned by death.

Knowlton v. *Moore,* 178 U. S. 41.

Counsel for the Collector at page 24 of their brief have inserted the report of the Committee on Ways and Means of the House of Representatives recommending the proposed departure from the rebuttable presumption of the prior Revenue Acts. The Wiscon-

sin Tax Commission made a strikingly similar report in recommending the Wisconsin Statute considered in the Schlesinger case. In its official biennial report to the Governor of the State of Wisconsin and to the Legislature of that State, and laid before the Legislature of 1913, which enacted the Wisconsin Statute in question, several recommendations were made by the Wisconsin Tax Commission among which were the following:

> "3. Providing more definitely for the taxation of transfers made in the form of gifts, grants, and donations when such transfers are in the nature of a final disposition or distribution of the estate of the donor or of a material part thereof. The general purpose of the law is to impose a tax upon the passing of estates from the ancestor to his successors. At present large estates or large portions of an estate may be, and frequently are, conveyed during the latter years of the owner's life to his children, in a manner that is clearly testamentary in its nature, yet that cannot readily be proved to have been made either in contemplation of death nor to evade the tax. The law should be made as broad in its language as it is in its purpose."
>
> *Schlesinger* v. *Wisconsin, supra,* at p. 235 (Argument for defendants in error).

The purpose of the two statutes as evidenced by said reports was the same, that purpose was to prevent the evasion of death duties. The effect of the statutes is likewise the same, that is, to subject gifts inter vivos not in fact testamentary in character to death duties. Clearly each statute by legislative fiat

enacts a rule of evidence which bars the taxable from the right to be heard on the ultimate fact presumed.

It is significant that the Revenue Act of 1926 was enacted three days prior to the announcement of this Court's decision in the Schlesinger case. Congress, therefore, did not have the benefit of the guidance of the opinion of this Court in the Schlesinger case when it enacted Section 302 (c) of the 1926 Act. It is obvious that in drafting the second sentence of the Revenue Act of 1926, the draftsmen of Section 302 (c) had before them the Wisconsin Statute which at the time stood supported by the Supreme Court of the State of Wisconsin.

This Court in the Schlesinger case found as follows:

> "The court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, they are subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character.

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect charges against 'B'. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.

"No new doctrine was announced in *Stebbins v. Riley*, 268 U. S. 137, cited by defendant in error. A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid. *Mobile, etc., R. R.* v. *Turnipseed*, 219 U. S. 35, 43, discusses the doctrine of presumption."

The decision of the Court disposed of the question of the validity of the Wisconsin Statute either as a tax on gifts inter vivos or as a levy sustainable as a tax on the transfer of decedent's estate at death.

Following *Schlesinger* v. *Wisconsin, supra*, the second sentence of Section 302 (c) of the Revenue Act of 1926 has been considered in the following cases arising in the Federal Courts:

Hall, Exr. v. *White*, 48 Fed. (2d) 1060 (Affirmed 53 Fed. (2d) 210, C. C. A. 1st).

Donnan, Exr. v. *Heiner*, 48 Fed. (2d) 1058.

Guinzburg, et al., Exr. v. *Anderson,* 51 Fed. (2d) 592 (Affirmed Fed. (2d)—(C. C. A. 2nd) not yet reported.

American Security & Trust Co., et al, v. *Commissioner, supra.*

And in this case below—51 Fed. (2d) 867; 53 Fed. (2d) 1042.

In each case the Court held the provision in question unconstitutional as being in violation of the due process clause of the Fifth Amendment.

The decisions of all the courts below with reference to the validity of the second sentence of Section 302 (c) of the Act are based primarily upon the decision of this Court in the Schlesinger case. The decisions of the lower courts are epitomized in the decision of the Circuit Court of Appeals of the United States for the Second Circuit in the Guinzburg case, *supra.* In that case Swan J., said:

> "In our opinion the question is ruled for this court by *Schlesinger* v. *Wisconsin,* 270 U. S. 230. There the legislation, being that of a state, was inhibited by the Fourteenth Amendment; here, being congressional action, it is subject to limitations imposed by the Fifth Amendment. *Nichols* v. *Coolidge,* 274 U. S. 531. There is no disguising the fact that the section in question lays an excise upon the making of a gift inter vivos provided the donor chances to die within two years. Such a classification would be whimsical and capricious unless viewed as necessary to prevent the evasion of estate taxes upon gifts actually made causa mortis but not capable of being proved to have been such. Such a view

was rejected in the Schlesinger case where the period during which the conclusive presumption operated was six years. Here it is only two years, and a persuasive argument can be made for differentiating the decision upon that ground; for the shorter the period, the greater will be the proportion of gifts actually made in contemplation of death, though not so proved, to be caught by the presumption. But the language of Mr. Justice McReynolds, who wrote for the majority, does not admit of the attempted distinction. This language has very recently been repeated by Mr. Justice Roberts in *Hoeper* v. *Tax Commission of Wisconsin,* decided November 30, 1931. Consequently we feel bound to hold the tax unconstitutional."

The Considerations Urged by the Government in Support of Section 302 (c) of the Revenue Act of 1926 Fail to Provide an Answer to the Objection that the Classification and Conclusive Presumption Attempted Are Invalid and that the Case of Schlesinger vs. Wisconsin Is Decisive of the Issue.

The gravamen of the Collector's argument in support of the contested statutes is that the statute is necessary to prevent evasion of estate taxes. Counsel complains that it is impracticable to establish that a transfer made by a decedent during his lifetime was made in contemplation of death for the reason that it is difficult to establish the motive of the donor (*U. S.* v. *Wells,* 283 U. S. 102) and because the evidence with reference to the donor's motive is in the possession of the estate. Any inherent difficulty

of proof resting on the Government with respect to transfers made by a decedent during his lifetime was removed by the rebuttable presumption of the Revenue Acts of 1916 to 1924 inclusive, a presumption which in a large measure shifted the burden of proof to the taxpayer. In every case in which the issue has been raised the Government has had the right to call witnesses in direct examination and to cross examine the witnesses of the taxpayer. Certainly the shifting of the burden of proof at least equalized the burden resting upon the Government and the taxpayer of showing whether or not a given transfer was in fact made in contemplation of death.

Counsel undertakes to show that the rebuttable presumption in the early Revenue acts was inadequate to prevent evasion by averring that the Government had been generally unsuccessful in establishing that transfers inter vivos were in fact made in contemplation of death. This argument overlooks four things:

(a) Those instances, undoubtedly numerous, where the estates of decedents have, without contest, paid the tax on the transfers which were indisputably in contemplation of death;

(b) Those instances in which the findings of the Commissioner that transfers were in contemplation of death have been accepted by the respective estates;

(c) That the records of the Board of Tax Appeals show that in many cases contested transfers were found to have been in contemplation of death, from which findings no appeals were taken;

(d) That in those cases in which the tax authorities failed to secure an adjudication that a given transfer was in contemplation of death the transfers may not in fact have been in contemplation of death.

It is, of course, not possible in this case for this Court to test the argument of counsel that most contested transfers have resulted in adjudications against the Government. The report of the House Ways and Means Committee is not evidence. In connection with the argument of necessity advanced by counsel, the finding of the Board of Tax Appeals in *American Security & Trust Company, et al.* v. *Commissioner, supra,* is significant. The identical argument of necessity was made before that body. Said the Board at page 355:

> "If it be conceded that the aim of the estate tax title of the 1926 Act is to impose a tax on transfers at death and those made before, but in contemplation of death we think the revenue which the Act is designed to produce is safeguarded by virtue of the rule which makes the determination of the Commissioner that a gift was made in contemplation of death *prima facie* correct. Whether such determination relates to a gift made within two years of death or more than two years prior to death, the burden of proving that the gift was not made in contemplation of death is wholly on the executor. It is not necessary for the Commissioner to offer proof to support his determination."

The opinion of the Board of Tax Appeals as to the adequacy of the prima facie presumption with respect to transfers, inter vivos, is entitled to the greatest

consideration coming as it does from the tribunal expressly created to consider matters arising under the tax statutes, and which, as is shown by the records of the Board, has considered scores of cases involving the issue of whether a given transfer was or not made in contemplation of death.

As has been previously stated in this brief, the Wisconsin Tax Commission made a report to the Legislature of the State of Wisconsin prior to the passage of the Wisconsin Statute under consideration in the Schlesinger case similar in all respects to the report of the House Ways and Means Committee on the Federal Statute here under consideration. It will be seen, therefore, that the Legislature of Wisconsin in passing the statute considered in the Schlesinger case was proceeding under the same recommendation of necessity as was Congress in the passage of Section 302 (c) of the Revenue Act of 1926. If the argument of necessity is competent to save the Federal Statute, it should have been equally competent to have saved the corresponding Wisconsin statute. In disposing of the argument of necessity which is the keystone of the Government's position in this case, the Court in the Schlesinger case, at page 240, said:

> "Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity."

In connection with the Government's argument that the contested sentence of Section 302 (c) is necessary to defend the revenue, it is interesting to

note the figures showing the source of revenue derived by the Government. The figures are offered although they are conceived to be largely immaterial to the issue. The Government derived from income taxes the sum of $1,860,040,497.39, and from estate taxes $48,078,326.98 for the year ending June 30, 1931. The income from estate taxes therefore amounted to substantially only two and one-half percent of the revenue derived from the income tax. By the annulment of the second sentence of Section 302 (c) of the Revenue Act of 1926 only a very negligible fraction of the estate tax otherwise collectible would fail of collection. It is therefore obvious that but a very small fraction of the revenue of the Government is involved in this issue, so small that it cannot be maintained that the issue seriously affects the revenue, and certainly is not large enough to create a national emergency justifying the abridgment of due process. The reenactment of a gift tax would provide adequate protection to the revenue.

In the second heading of its argument the Government urges that the classification of all transfers made within two years of death with the transmission of property at death is not unreasonable in that it has "a reasonable relation" to the end sought to be obtained; that is, the collection of estate tax. As has been pointed out, transfers, inter vivos, in contemplation of death were held to be properly classified with the transmission of property at death because such transfers partake of the nature of testamentary dispositions. So, in *United States* v. *Wells, supra,*

at page 116, Mr. Justice Hughes speaking for the Court said:

> "The statutory description embraces gifts inter vivos, despite the fact that they are fully executed, are irrevocable and indefeasible. The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the tranferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax."

Counsel for the Government does not explain how a transfer made by a father of thirty in robust health, to be accumulated for the education of his first born child, bears any "reasonable relation" to the transmission of property by him at death if he should be killed in an automobile accident within two years.

In their effort to justify the classification attempted by the statute under consideration, counsel argues that it is enough "if the classification is reasonably founded in 'the purposes and policies of taxation'", citing *Watson* v. *State Comptroller*, 254 U. S. 122, 124; *Stebbins* v. *Riley*, 268 U. S. 137, 143. The identical argument was made by counsel for the State of Wisconsin in the Schlesinger case. *Stebbins* v. *Riley, supra,* was there and apparently is here urged as establishing a corollary to the familiar rules required of classification for tax purposes. This Court, in *Schlesinger* v. *Wisconsin, supra,* at page 240, said:

> "No new doctrine was announced in *Stebbins* v. *Riley*, 268 U. S. 137, cited by defendant in error. The classification for purposes of taxation must rest on some reasonable distinction."

It is therefore understood that it is still the law:

(1) That classification for tax purposes must be reasonable and not arbitrary;

(2) That the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

Counsel for the Collector lay great stress upon the circumstance that statutes that include innocent transactions within the proscribed class have by this Court been held constitutional. They argue that the fact that transfers, inter vivos, not made in contemplation of death, are included within the purview of the second sentence of Section 302 (c) of the Revenue Act of 1926, does not make the provision objectionable under the theory of those cases. This is the argument of the dissenting opinion of Mr. Justice Holmes in the Schlesinger case which was summed up as follows:

> "Of course many gifts will be hit by the tax that were made with no contemplation of death. But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured." *U. S.* v. *Schlesinger, supra.*

The rule contended for by counsel for the Collector is in no sense different from the principles gov-

erning the laws of classification for taxation purposes. If it were not so the established rules of classification would be abrogated. It is submitted that the "penumbra" referred to by Mr. Justice Holmes in connection with estate taxation is represented by gifts, inter vivos, made in contemplation of death and is limited to such gifts.

Assuming that a minority of gifts made within two years of death were not made in contemplation of death, which fact is not admitted and is not believed to be true, are not the rights of the innocent donor guarded by the Constitution? We submit that the language of this Court in the Schlesinger case, supra—

> "That is to say, 'A' may be required to submit to an enactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect charges against 'B'. Rights guarded by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity"

is singularly apt and conclusive on this point.

Counsel attempts to distinguish the Schlesinger case on the ground that the Wisconsin Statute set up a six year presumption, whereas the conclusive presumption in the Federal Statute is only two years. The decision of this Court in the Schlesinger case is, however, not based upon the length of the period of the conclusive presumption. No one of the seven courts which have construed the provision of the 1926 Act here under consideration, has conceived that

the length of the conclusive presumption in the Wisconsin Statute, considered in the Schlesinger case, was the basis of the rejection by this Court of that statute. The Court of Errors and Appeals of the State of Kentucky concluded that the decision of this Court in the Schlesinger case meant that the three year period of the presumption of the Kentucky legislature was invalid. Obviously the difference between the six year period and the two year period is one of degree and not of kind. The ratio decidendi of the opinion in the Schlesinger case is not that the conclusive presumption of the Wisconsin statute was unreasonably long but that any conclusive presumption which attempts to classify transactions not made in contemplation of death, or not testamentary in character, with those testamentary in character is unreasonable and arbitrary.

This Court has recognized that its holding in the Schlesinger case meant that the classification there attempted did not have a fair and substantial relation to the object of the legislation.

Ohio Oil Co. v. *Conway,* 281 U. S. 146, at page 160.

The decision is not susceptible of being distorted so as to say that while gifts made within six years of death, but not in contemplation thereof, have no reasonable relation to the transmission of property at death, such of the gifts made by a decedent within six years of death as occurred within two years of death, although not in contemplation thereof, have a reasonable relation to transfers at death.

If it be said that the purpose of the contested legislation was "to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax", the result is the same. Gifts inter vivos not testamentary in character have no basic similarity to testamentary dispositions and thus are not germane to the purpose of the legislation, assuming that purpose to have been the taxation of testamentary dispositions.

Counsel for the Government repeatedly refers to a statement by this Court in *United States* v. *Wells*, *supra*, at page 117, that:

> "The natural and reasonable inference which may be drawn from the fact that but a short period intervenes between the transfer and death is recognized by the statutory provision creating a presumption in the case of gifts within two years prior to death."

Counsel apparently attempt to find from the above language of the Court that this Court has held that there is a reasonable inference, in fact, that all transfers made within two years of death were made in contemplation of death. The context of the sentence of the above quotation shows, that in using the language quoted the Court was engaged in defining the meaning of the phrase "contemplation of death". Neither in the quotation nor in the decision in the Wells case does the Court find that an absolute or even a reasonable inference is to be drawn that all transfers made within two years of death are made in contemplation of death. The language of the

Court was that such an inference might be reasonable in a given case. Further, the phrase was used with reference to a statute containing a rebuttable presumption and not a conclusive presumption. The real significance of the Court's language is to be gathered from the paragraph in which the quoted sentence is found:

> "The statutory description embraces gifts inter vivos, despite the fact that they are fully executed, are irrevocable and indefeasible. The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Milliken* v. *U. S., ante,* p. 15. As the transfer may otherwise have all the indicia of a valid gift inter vivos, the differentiating factor must be found in the transferor's motive. Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. As a condition of body and mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or non-existence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in

> contemplation of death. The natural and reasonable inference which may be drawn from the fact that but a short period intervenes between the transfer and death is recognized by the statutory provision creating a presumption in the case of gifts within two years prior to death. But this presumption, by the statute before us, is expressly stated to be a rebuttable one, and the mere fact that death ensues even shortly after the gift does not determine absolutely that it is in contemplation of death. The question, necessarily, is as to the state of mind of the donor."

Counsel's argument apparently is that the six year period of the Wisconsin Statute was so long that the presumption there set up was unreasonable, but that, in the case of transfers made within two years of death, the reasonable inference, in the generality of cases, is that they were made in contemplation of death, and, so, the classification of such transfers, as transfers in contemplation of death, is reasonable. A gift may be made in contemplation of death at any time during life, but it is equally true that a gift may be made during life and within two years of death without any thought of death. It is a matter of common knowledge that two years is a sufficient length of time for a person to contract a chronic disease which may be fatal within that period. It is not straining the field of speculation to say that the vast majority of people are not contemplating death and are not motivated in the natural conduct of their affairs by the thought of death for as long a period as two years before the

event. Certainly it cannot be seriously argued that the generality of gifts made within two years of death are made in contemplation of death. At best, counsel's argument is based on a difference in degree rather than a difference in kind. The Schlesinger case cannot be so distinguished.

The Executor has no quarrel with the principle that Congress may include within the scope of its legislative acts, measures reasonably necessary to carry its powers into execution. It is, however, contended that the second sentence of Section 302 (c) is not such a reasonable measure.

Article I, Section 8 of the Constitution is not paramount to the remainder of the Constitution. The Fifth Amendment is in all respects in pari materia with said Article and Section. The power of Congress to lay and collect taxes therefore must be exercised in such way as not to deprive a person of his property without due process of law. If this were not so, then the judicial branch of the Government would have no function with respect to the assessment of taxes other than to assist in the execution of taxing statutes. Such a concept is plainly repugnant to the conceptions of a government under the American Constitution.

Counsel further attempts to distinguish the *Schlesinger case* and *Baldwin* v. *Missouri,* 281 U. S. 586, and *Hoeper* v. *Tax Commission of Wisconsin, et al, supra,* No. 17, October Term, 1931, in this Court, in which cases the decision in the Schlesinger case was

reviewed and cited with approval by this Court, on the ground that in those cases the degree of necessity present was so slight as to make the legislative action considered in those cases unreasonable, whereas in the present case the degree of necessity is different. To state the proposition is to answer it. Rights guaranteed by the Constitution are definite and substantive in character. Distinctions based upon mere degree are too hazardous to form a basis for the guarding of constitutional rights. Counsel's effort is obviously unsound under the decision in the Schlesinger case.

The Fifth Amendment in Its Application to the Legislation of Congress Is Similar in Scope and Effect to the Fourteenth Amendment in Its Application to Legislation of the States.

If the Schlesinger case is to be distinguished from the case at bar it must be so done upon the theory that the restrictions imposed upon the States by the Fourteenth Amendment to the Constitution are different in substance and principle from the restrictions imposed upon Congress by the Fifth Amendment. Counsel for the Collector do not baldly assert such a theory but their argument strongly suggests it. It is now too well settled to require an elaborate citation of authority that the due process clause applies equally to Federal statutes by reason of the Fifth Amendment as to State statutes by reason of the Fourteenth Amendment. This proposition was recently sustained by this Court in *Nichols* v. *Coolidge*, 274 U. S. 531, at page 542, in which case Mr.

Justice McReynolds in construing Section 402 (c) of the Revenue Act of 1918, speaking for the Court, at page 542, said:

> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, 24; *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450. See also *Knowlton* v. *Moore*, 178 U. S. 41, 77."
>
> See also *Coolidge* v. *Long*, 282 U. S. 582.

The Ruling in Schlesinger v. Wisconsin Stands Unimpaired.

The issue of the validity of the statutory provision here under consideration has already been before this Court collaterally. Following the decision of the Court in the Schlesinger case, and following the passage of the Revenue Act of 1926, counsel for the State of Wisconsin in their motion for reargument urged upon this Court that its decision in the Schlesinger case would have the effect of invalidating the second sentence of Section 302 (c) of the Federal Act. The motion for reargument was nevertheless denied.

This Court recently had occasion to consider its decision in the Schlesinger case in *Hoeper* v. *Tax Commission of Wisconsin*, et al., No. 17, October Term, 1931. In the Hoeper case there was before the Court a statute of the State of Wisconsin which provided that the income of a wife should be added

to that of a husband and the aggregate amount of the family income should be assessed to the husband. It was argued for the State that the provision was necessary to prevent frauds and evasions of tax by married persons, and by the taxpayer that the classification attempted was unreasonable and arbitrary. Counsel for the State urged that the opinion in *Schlesinger* v. *Wisconsin* was not inconsistent with the tax proposed, but this Court speaking by Mr. Justice Roberts said:

> "The court below assigned two reasons which it thought removed the Constitutional objections to the application of the statute in the instant case. It cited and followed the Income Tax Cases, 148 Wis. 456, where tthe statute here in question was sustained on the ground that the provisions under attack are necessary to prevent frauds and evasions of the tax by married persons, and stated that the decision of this Court in *Schlesinger* v. *Wisconsin*, 270 U. S. 230, was not inconsistent with the views expressed by the Supreme Court of Wisconsin in its earlier decision. To this we cannot agree. In the Schlesinger case this Court held invalid a statute which, for purposes of inheritance tax, classified all gifts inter vivos, effective within six years of death, as gifts made in contemplation of death. To the argument of the necessity for such classification to prevent frauds and evasions, it was answered:
>
> "'That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against

'B'. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.'

"The claimed necessity cannot justify the otherwise unconstitutional exaction."

The ruling in the Schlesinger case has been the law of the land for five years. Shortly after its promulgation the ruling was reaffirmed in *Uihlein* v. *State of Wisconsin*, 273 U. S. 642. The ruling has been followed repeatedly by this Court and has formed the basis of many decisions by inferior Federal Courts and by State Courts.

We conceive the law to be that the necessary basis of fact must exist before the taxing power can be invoked. The legislature can make the law to apply to the facts. It cannot first set up false facts and then apply the law to the false basis so created by it. If this were not so then the legislative branch of the Government could in any case do by indirection what it is forbidden to do directly. Whether the facts forming the basis of the invocation of the taxing power exists is a judicial question to be determined from the evidence in a given case.

It is respectfully submitted that the ruling in *Schlesinger* v. *Wisconsin, supra,* is controlling of the issue at bar, and that the answer to the question certified should be in the affirmative.

CONCLUSION.

The classification attempted is arbitrary and capricious and otherwise in violation of the provisions of the Fifth Amendment to the Constitution of the United States. The issue is controlled by Schlesinger against Wisconsin, supra, and it is respectfully submitted that the question certified should be answered in the affirmative, and the decision of the United States District Court should be affirmed.

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